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Nos. 01-10873 and 02-5034

In the Supreme Court of the United States

KHANH PHUONG NGUYEN, PETITIONER

v.

UNITED STATES OF AMERICA

TUYET MAI THI PHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the judgment of the court of appeals was vitiated by the participation of a non-Article III judge.

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OPINION BELOW

The opinion of the court of appeals (01-10873 Pet. App. 1-6) is reported at 284 F.3d 1086.[1]

[1] All citations to the petition appendix refer to the appendix filed in No. 01-10873, which is identical to the petition appendix filed in No. 02-5034.

JURISDICTION

The court of appeals entered its judgment on March 25, 2002. Neither petitioner filed a petition for rehearing. The petition for a writ of certiorari in No. 01-10873 was filed on May 29, 2002, and the petition for a writ of certiorari in No. 02-5034 was filed on June 18, 2002. This Court granted review in both cases on November 4, 2002. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions reproduced in the appendix to petitioners' brief, at App. 1a-5a, this case requires consideration of Federal Rule of Criminal Procedure 52(b), which provides:

> **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Following a jury trial in the District Court for the District of Guam, petitioners were convicted of conspiracy to import methamphetamine, in violation of 21 U.S.C. 952(a) and 963, importation of methamphetamine, in violation of 21 U.S.C. 952(a) and 960, and attempting to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a). Pet. App. 1. Both petitioners were sentenced to 212 months' imprisonment. The court of appeals affirmed. *Id.* at 1-6.

1. a. Guam is an unincorporated territory of the United States that was ceded to the United States in 1899 following the Spanish-American War. 48 U.S.C. 1421, 1421a; see also *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 599-600 n.30 (1976) (explaining the doctrine of incorporated and unincorporated territories). Petitioner Nguyen is a citizen of Vietnam and was, at the time of her arrest, a lawful permanent resident in the Territory of Guam.[2] Petitioner Phan is a United States citizen and a resident of Guam. Neither petitioner is a resident of a State within the United States.

b. In December 1999, a Guam Customs Officer conducted a drug-detection canine sniff of mail parcels at Guam's Main Postal Facility. Pet. App. 2; Gov't C.A. Br. 4. The dog alerted to an express mail package that was addressed to Linda Phan in Guam, and that contained a return address of Michael Tran, 12181 Candy Lane, Garden Grove, California. Pet. App. 2-3. After obtaining a search warrant, the Customs Officer opened the package and found, among other things, five cylinders containing 443.8 grams of 97 percent pure d-Methamphetamine Hydrochloride. *Id.* at 2; Gov't C.A. Br. 5-6. The Customs Service prepared the package for a controlled delivery by substituting rock salt for the methamphetamine. Pet. App. 2. The surface of each cylindrical object was sprayed with "clue spray," an invisible fluorescent powder that turns orange when illuminated with ultraviolet light. *Id.* at 3.

During the controlled delivery, petitioner Phan claimed the package at her local post office. Although the post office is only one block from her apartment, Phan took a twenty-five minute, "'circuitous' route" home, driving all the way to Guam Memorial Hospital just to dispose of the express mail packaging. Pet. App.

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[2] As an alien convicted of aggravated felonies and violations of the controlled substances laws, Nguyen is now subject to removal. 8 U.S.C. 1227(a)(2)(A)(iii) and (B), 1252(a)(2)(C).

3; Gov't C.A. Br. 8-9. After Phan entered the apartment, a breaching signal indicated to officers that the package had been opened. The officers entered the apartment and found both petitioners in the living room, surrounded by parts of the opened package. Two of the cylinders were in the toilet and three were in the bathtub. Pet. App. 3. The officers spotted orange clue spray on petitioner Nguyen's hand and dress. After obtaining search warrants, the officers recovered from petitioner Nguyen's apartment drug paraphernalia and a small amount of methamphetamine. *Ibid.*; Gov't C.A. Br. 12. Officers later learned that California police had interviewed Nguyen's brother, who is also Phan's nephew, on an unrelated matter. Pet. App. 3. When asked for identification, he presented a falsified California driver's license bearing the same address as that appearing on the return label of the Guam package. *Ibid.*

2. A grand jury indicted petitioners on charges of conspiring to import methamphetamine, in violation of 21 U.S.C. 952(a) and 963 knowingly aiding and abetting in the importation of more than fifty grams of methamphetamine, in violation of 21 U.S.C. 952(a) and 960; and attempting to possess with intent to distribute more than fifty grams of methamphetamine, in violation of 21 U.S.C. 841(a). Pet. App. 4. The case was tried in the District Court of Guam, a territorial court created by Congress under Article IV, Section 3, Clause 2 of the Constitution, which empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." See also 48 U.S.C. 1424. The judge that presided over the trial was an Article IV district court judge. 48 U.S.C. 1424b(a). A jury found both petitioners guilty on all

counts. Pet. App. 4. The district court sentenced both petitioners to 212 months' imprisonment. *Ibid.*

3. The court of appeals unanimously affirmed. Pet. App. 1-6. The court of appeals panel, sitting in the United States Territory of Guam, consisted of Chief Judge Schroeder, Judge Goodwin, and, sitting by designation, Chief District Judge Munson of the District of the Northern Mariana Islands. Like the Guam district court, the District of the Northern Mariana Islands is a court created by Congress under Article IV, Section 3 of the Constitution. See 48 U.S.C. 1821(a). Chief Judge Munson is an Article IV judge, appointed by the President and confirmed by the Senate to serve a term of ten years. 48 U.S.C. 1821(b). No objection was made to the composition of the panel before, during, or after oral argument and submission of the cases, and no petitions for rehearing or rehearing en banc were filed.

SUMMARY OF ARGUMENT

Petitioners suggest that this case has "profound implications" for our constitutional system of governance, Pet. Br. 3, and presents grave and sensitive questions about the intersecting powers of the Judicial, Legislative, and Executive Branches of government under Articles II, III, and IV of the Constitution. But, in fact, this case involves nothing more than an isolated, one-time mistake in statutory construction by a single member of the judiciary. Petitioners offer no basis for concluding that, in designating Chief Judge Munson to hear petitioners' cases, the Chief Judge of the Ninth Circuit deliberately courted difficult constitutional questions or intended to prompt an inter-Branch confrontation. Established principles of constitutional avoidance compel the opposite presumption: "It ought

never to be assumed" that a government official in any of the three Branches "intended to usurp or assume power prohibited to it," *Grenada County Supervisors* v. *Brogden*, 112 U.S. 261, 269 (1884), and constitutional questions should "not be needlessly confronted," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). See generally *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring). Accordingly, in the absence of a continuing and concerted policy of designating non-Article III judges to sit on court of appeals' panels, or other evidence of a deliberate constitutional confrontation between the Branches, there is no occasion for this Court to expound upon the delicate and difficult constitutional questions petitioners raise. Sometimes a mistake is just a mistake.

That mistake, moreover, could have been easily remedied had petitioners raised their concerns about the presence of a non- Article III judge before the court of appeals. But they chose not to, preferring to hold that objection in reserve until they came before this Court. Petitioners now seek to invoke this Court's supervisory authority. 01-10873 Pet. 6; 02-5035 Pet. 5. But that supervisory authority is designed to promote "the interests of the administration of criminal justice"; it "ought not to give implied sanction" to appellate gamesmanship or laxity in the preservation of errors, or "to permit the waste and unfairness involved in a new [appeal] if there is no foundation for it." *Ballard* v. *United States*, 329 U.S. 187, 202-203 (1946) (opinion of Frankfurter, J.).

If this Court reaches petitioners' constitutional objections to the panel, it should reject them for the simple reason that petitioners do not enjoy the constitutional

protections they assert. From its earliest days, this Court has consistently held that the protections of Article III do not apply to residents of the territories. Nothing in the Constitution required that petitioners' appeals be heard before an Article III-compliant tribunal. They do not belong to the class of persons for whom that constitutional protection was designed. Congress's passage of a statute directing appeals to the Ninth Circuit did not alter their constitutional rights; it created at most a statutory right, which petitioners abandoned below.

Nor does this case implicate structural protections under Article III that transcend the personal rights of petitioners. In the first place, neither the structural nor the personal protections embodied in Article III apply to the territories. In the second place, this case does not involve inter-Branch aggrandizement or encroachment. It involves an error committed by an official internal to the Judicial Branch. Any intrusion on the Judicial Branch's integrity and independence thus was self-inflicted and wholly capable of internal correction. This Court should not use the isolated internal misstep of a Judicial Branch official as a basis for pronouncing limitations on legislative power that Congress has never exercised, especially when such pronouncements would be for the sole purpose of providing a windfall benefit to defendants whose guilt was proved by overwhelming evidence and who slept on their rights in the court below.

ARGUMENT

I. PETITIONERS' UNTIMELY STATUTORY OBJECTIONS TO THE COMPOSITION OF THE APPELLATE PANEL DO NOT IMPAIR THE VALIDITY OF THE JUDGMENT AFFIRMING THEIR CONVICTIONS

A. The Relevant Statutory Provisions Do Not Authorize The Designation Of Territorial Judges To Sit As Members Of The Federal Judicial Circuits

The Chief Judge of the Ninth Circuit designated Chief Judge Munson of the District of the Northern Mariana Islands to sit on a Ninth Circuit panel pursuant to 28 U.S.C. 292(a). That Section provides, in relevant part:

> The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.

The Chief Judge believed the designation to be appropriate because Chief Judge Munson is a district judge whose court is within the Ninth Circuit. 48 U.S.C. 1821, 1823; 28 U.S.C. 1294(4); see generally *Territory of Guam* v. *Olsen*, 431 U.S. 195, 196 & n.1 (1977). In addition, Congress directed that, "[w]here appropriate," the provisions of Title 28 shall apply to the District Court for the Northern Mariana Islands. 48 U.S.C. 1821(c).

As petitioners explain at some length (Br. 7-15), however, Congress's reference to district judges in Section 292(a) was intended to be more particularized, referring only to judges of the United States District Courts who were appointed under Article III of the Constitution and who enjoy that Article's guarantees of life tenure and undiminished compensation. See 28

U.S.C. 133 (listing district judges to be appointed under Article III, and omitting territorial judges); *id.* at 451 (defining "district court" by reference to Title 28's list of United States district courts and judgeships, which does not include territorial judges or courts).

That understanding of Section 292(a)'s reference to "district judge" is confirmed, as petitioners further explain (Br. 12-14), by Congress's use of the term throughout Title 28 and that Title's distinctive treatment of the District Court for the Northern Mariana Islands and similarly situated territorial courts. See 28 U.S.C. 452-459, 462.

In short, the government agrees with petitioners that Title 28 does not expressly authorize, as a matter of statutory law, the designation of territorial judges to sit on the federal courts of appeals.

B. Petitioners Abandoned Their Statutory Objection To The Composition Of The Ninth Circuit Panel

"No procedural principle is more familiar to this Court" than that a statutory or constitutional right "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). The "failure to make the timely assertion of a right" is deemed to be a forfeiture of the right, 507 U.S. at 733, which can be reviewed only for plain error, Fed. R. Crim. P. 52(b). By contrast, "the intentional relinquishment or abandonment of a known right" waives and thereby "extinguish[es]" the right, precluding even plain error review. 507 U.S. at 733 (citation omitted).

At a minimum, petitioners forfeited their statutory objection to the composition of the panel by failing to

raise it before the court of appeals. Petitioners did not challenge the composition of the court of appeals at any time before filing their petitions for writs of certiorari. Petitioners filed no objection to the composition of the court of appeals' panel before oral argument, although the composition of the panel was disclosed eleven days in advance of argument. J.A. 7; see also J.A. 9-12; Ninth Circuit General Order 3.5 ("The composition of panels shall be made public on the first working day of the week preceding argument."). While, five days before the scheduled argument, petitioner Phan communicated with the court her election to forgo oral argument, she voiced no objection to the presence of Chief Judge Munson on the panel that would decide her case. Oral argument was heard in petitioner Nguyen's case, without her counsel voicing any objection to the panel's composition.

In the six weeks that followed before decision in the case, counsel for both petitioners neglected to object to Chief Judge Munson's participation in their cases. Finally, after the court issued a decision affirming their convictions, neither petitioner filed a petition for rehearing or for rehearing en banc, even though a petition for rehearing would have alerted the court to the problem in time to permit reargument of the case before a new panel, and rehearing en banc would have provided precisely the consideration by a full complement of Article III judges that petitioners now say they wanted. See *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685, 689-690 (1960) (purpose of rehearing en banc "is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control" decision-making by the court) (citation omitted).

There is reason to believe, moreover, at least with respect to petitioner Nguyen, that the objections belatedly raised before this Court were knowingly waived below. Chief Judge Schroeder has advised that both she and Judge Goodwin recall counsel for Nguyen approaching them ex parte, the day before oral argument at a meeting of the Guam Bar Association, and mentioning that there might be a problem with Chief Judge Munson sitting on the panel because he is not an Article III Judge.[3] Counsel for Nguyen, who argued before the Ninth Circuit panel the following day, thus seems to have been fully aware that he had a potential legal objection to the panel's composition and yet apparently consciously chose not to raise the issue before the Ninth Circuit at oral argument, during the six weeks after argument, or following the decision. Apparently, "[i]t was only after the judge ruled against them that petitioners developed their current concern over whether his appointment violated * * * the Constitution" or statutory law. *Freytag* v. *Commissioner*, 501 U.S. 868, 892-893 (1991) (Scalia, J., concurring in part and concurring in the judgment).

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[3] The Assistant United States Attorney who represented the United States on appeal advises that counsel for Nguyen subsequently told him about his communication with the judges, and his description of that conversation was the same as Chief Judge Schroeder's.

C. The Designation of Chief Judge Munson To A Court Of Appeals' Panel Sitting In A Territory And Considering Only Cases Arising From That Territory Was Not Plain Statutory Error

Under Federal Rule of Criminal Procedure 52(b), courts have only "a limited power to correct errors that were forfeited because not timely raised" below. *Olano*, 507 U.S. at 731. Under the rule, there must be an "error" that both is "plain" and "affect[s] substantial rights." *Id.* at 732. Even if such an error occurred, this Court should not exercise its discretion to correct the error unless it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (citation and brackets omitted); see also *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002). The designation of Chief Judge Munson did not amount to plain error.

1. *No Plain Error Occurred*

The United States agrees that error occurred because the relevant statutory provisions, read as a whole, envision only the designation of district judges from United States district courts rather than from the territorial courts.

That error, however, was not plain. Nothing in Title 28 expressly precludes the designation of territorial district judges to sit on court of appeals panels. Nor does Title 28, in authorizing the designation of "district judges" to sit on appellate panels, 28 U.S.C. 292(a), offer a definition of "district judges." Cf. 28 U.S.C. 451 (defining "district court," but not "district judge"). No case authority specifically addressed, let alone forbade, the designation. In fact, Hawaii territorial judges had sat on Ninth Circuit panels for a brief period in the mid-1950s, so the designation was not without precedent. See, *e.g.*, *Irish* v. *United States*, 225 F.2d 3 (9th Cir. 1955); *Chernekoff* v. *United States*, 219 F.2d 721 (9th Cir. 1955); see also *Territorial Judge Assigned Temporarily to United States Court of Appeals*, 69 Harv. L. Rev. 760 (Feb. 1956).[4] The statutory arguments advanced by petitioners for the first time before this Court appear to be matters of first impression never before addressed by any federal court. Finally, the established inapplicability of Article III of the Constitution to cases arising within the territories, see Section IIB, *infra*—the only cases Chief Judge Munson was designated to hear—could have influenced the Chief Judge's understanding of the scope of the statutory designation authority.

2. *Petitioners' Substantial Rights Were Not Affected*

The error in statutory construction did not affect the petitioners' substantial rights. A right is substantial if it affects the outcome of the court's proceedings, *Olano*, 507 U.S. at 734, or if it is a "structural" error "affecting the framework within which the [case] proceeds," *Johnson* v. *United States*, 520 U.S. 461, 468 (1997) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991)). Petitioners bear the burden of establishing prejudice arising from the designation of Chief Judge Munson. *Olano*, 507 U.S. at 734. They have failed to do so.

Petitioners' appeal was heard and decided by two Article III judges, in addition to Chief Judge Munson. Both of those judges agreed that petitioners' challenges to the district court's evidentiary rulings, which are subject to highly deferential abuse-of-discretion review, Pet. App. 4, were without merit. Judge Goodwin,

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[4] The government has been able to identify forty cases on which Judge Wiig, and 24 cases on which Judge McLaughlin, both of the District of Hawaii, sat between 1950 and 1956.

writing for the court, explained that petitioners' evidentiary challenges were "overstate[d]," and that the district court "clearly performed the necessary" analysis. *Id.* at 5. With respect to petitioners' sufficiency of the evidence argument, the judges were also unanimous that "[t]here was plenty of evidence," *id.* at 6, and "abundant facts," *id.* at 5, including the "circuitous" route home from the post office, *id.* at 3, and "the presence of nearly a hundred little plastic zip lock bags and $6,000 in cash in the apartment," *id.* at 6, to reject the defense "picture of two innocent women eagerly opening a Christmas package with no idea of what it contained," *ibid.*

Indeed, in light of the overwhelming evidence of their guilt and the insubstantiality of their challenges to their convictions, it is perhaps understandable that petitioners have made no effort to persuade this Court that any judge—Article III or not—would have resolved their appeal any differently. Nor have petitioners argued that Chief Judge Munson was biased or somehow lacked the legal skills and ability fairly to evaluate their arguments on appeal. See *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (lack of an impartial trial judge is a structural error). Instead, they attempt to meet their burden of showing *actual* prejudice by *hypothesizing* about the potential impact of Chief Judge Munson's presence on the panel's deliberations. Pet. Br. 42-44.

That argument fails. In *Olano*, this Court refused to "presume prejudice" arising from the presence of alternate jurors during jury deliberations, 507 U.S. at 740, even though the Court agreed that such prejudice could arise "[i]n theory" either from the alternates' actual participation "verbally or through 'body language,'" or the chilling affect of their presence in the jury room, *id.* at 739. See also *United States* v. *Myers*, 280

F.3d 407, 413 (4th Cir.) (presence of thirteenth juror throughout jury deliberations was not plain error where defendant did not make "a specific showing of prejudice"), cert. denied, 123 S. Ct. 53 (2002). Likewise in this case, petitioners cannot simply presume prejudice from the presence of Chief Judge Munson on the panel and during deliberations. Petitioners were required to offer "direct evidence" that the votes of the two Article III judges would have changed in his absence. *Olano*, 507 U.S. at 740.

For the same reason, petitioners cannot show that structural error occurred. In fact, petitioners' claim is much more structurally amenable to plain error review than the jury-composition question addressed in *Olano*. The jurors in *Olano* were laypersons charged with finding the facts and making crucial credibility judgments in a criminal trial in the first instance. The ability of judges after the fact to recreate those deliberations and determine how any single individual might have influenced them is highly circumscribed and necessarily speculative, given the wide range of factors that can sway jurors and the fact that hesitation in just one juror can change the outcome of the trial. Here, by contrast, the Ninth Circuit panel was reviewing purely legal arguments on the same appellate record that is before this Court. Indeed, petitioner Phan's appeal was submitted without oral argument, so the record consists exclusively of the papers that are now before this Court. This Court accordingly can readily determine that the evidence of guilt is so overwhelming that no reasonable judge (let alone the necessary two) could have found grounds for reversing the judgments of conviction.

3. *The Error Did Not Affect the Court's Jurisdiction*

Petitioners argue (Br. 33-39) that the error was jurisdictional and, therefore, must be considered by this Court. The judgment under review by this Court, however, is not the judgment of Chief Judge Schroeder, Judge Goodwin, and Chief District Judge Munson. It is the judgment of the United States Court of Appeals for the Ninth Circuit. There is no question that, under the relevant statutory provisions, the Ninth Circuit had subject matter jurisdiction over this appeal, 28 U.S.C. 1294, and the "statutory * * * *power* to adjudicate the case," *Cotton*, 122 S. Ct. at 1785 (citation omitted). See also *Ex parte Ward*, 173 U.S. 452, 454 (1899) (distinguishing between "jurisdiction" of the court, and a particular individual's "right to exercise the judicial functions," where his appointment is challenged under Article III); *Peretz* v. *United States*, 501 U.S. 923, 953 (1991) (Scalia, J., dissenting).

Furthermore, Congress has already determined that the presence of two Ninth Circuit judges on a panel is sufficient to empower that court to exercise jurisdiction over and to act upon a case. 28 U.S.C. 46(d) (two judges constitute a quorum for a court of appeals panel). "A majority of the number of judges thus authorized to constitute the court was present, heard oral argument, and participated in the decision, as provided in 28 U.S.C. § 46(c) and (d)." *Tobin* v. *Ramey*, 206 F.2d 505, 506 (5th Cir. 1953), cert. denied, 346 U.S. 925 (1954).[5]

[5] See also *ASW Allstate Painting & Constr. Co.* v. *Lexington Ins. Co.*, 188 F.3d 307, 309 n* (5th Cir. 1999) ("When one of the three judges of a panel dies or becomes unable to participate, the remaining two judges are authorized to proceed with the determination of the appeal"); *United States* v. *Desimone*, 140 F.3d 457, 458-459 (2d Cir.) (Section 46(d) "requires only that [the quorum] be a majority of a legally authorized panel"), cert. denied, 525 U.S. 874 (1998); *Murray* v. *National Broad. Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (holding that 28 U.S.C. 46(b) "was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate"), cert. denied, 513 U.S. 1082 (1995).

That rule derives from the common-law principle, long recognized by this Court, that "a quorum constituted of a simple majority of a collective body is *empowered* to act for the body" and is "sufficient to perform the function of the body." *FTC* v. *Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967) (emphasis added; citation omitted); see also *id.* at 184 (discussing rule's application to courts); *Pollard & Pickett* v. *Dwight*, 8 U.S. (4 Cranch) 421, 429 (1808) (Marshall, C.J.) (dismissing as having "little foundation" a challenge to the jurisdiction of a court of appeals to act, where the required quorum was present).

Petitioners cite *Ayrshire Collieries Corporation* v. *United States*, 331 U.S. 132 (1947) (Pet. Br. 43), but that case supports the government's position, not petitioners'. In *Ayrshire*, the Court held that the full complement of three judges was necessary to enjoin the enforcement of Interstate Commerce Commission orders because Congress, in the Urgent Deficiencies Act, had specifically directed that such cases "shall be heard and determined by three judges." 331 U.S. at 137. This Court concluded that Congress "meant exactly what it said," *ibid.*, finding it "significant that this Act makes no provision for a quorum of less than three judges" because "[t]wo judges of a three-judge circuit court of appeals * * * ordinarily constitute a statutory quorum for the hearing and determination of cases," *id.* at 138. *Ayrshire* thus stands for the proposition that, where Congress expressly says that "[a]ll

three judges * * * must fully perform the judicial function," *ibid.*, courts cannot permit less. By the same token, when Congress says that a majority—two judges—may act for a panel of three, courts cannot require more.

Petitioners also mistakenly rely (Br. 34, 38-39) on cases where Congress expressly prohibited judges to sit on courts of appeals in certain circumstances. For example, in *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913), this Court considered a federal law providing that "no judge before whom a cause or question may have been tried or heard in a district court * * * shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals." *Id.* at 649 (citation omitted). This Court held that, when a district court judge sat in contravention of that "comprehensive and inflexible" prohibition, *id.* at 650, the court of appeals was statutorily unable to act. In so holding, however, the Court did not adopt petitioners' proposed categorical rule that any error in panel composition must automatically vitiate a court of appeals' judgment. The Court held only that courts constituted "in violation of the *express prohibitions* of [a] statute" lack the authority to act. *Ibid.* (emphasis added).[6] Again, that holding supports the position that it is the language of the applicable statute that defines a court's

[6] See *Moran* v. *Dillingham*, 174 U.S. 153, 157 (1899) (interpreting the same "positive prohibition of the legislature") (cited at Pet. Br. 34, 38-39); *American Constr. Co.* v. *Jacksonville, Tampa, & Key West Ry.*, 148 U.S. 372, 387 (1893) (enforcing the same statutory prohibition) (cited at Pet Br. 33-34, 38-39); see also *Frad* v. *Kelly*, 302 U.S. 312, 318 (1937) (statute expressly provided that "jurisdiction is vested in the trial court and in no other") (cited at Pet. Br. 34).

power to act. Here, the composition of the panel did not run afoul of any "comprehensive and inflexible" statutory "prohibition," *ibid.*, and Congress has said that the presence of two circuit judges is sufficient for the court to act.

4. *The Error Did Not Seriously Affect the Fairness, Integrity, or Public Reputation of Judicial Proceedings*

Even if this Court concludes that plain error occurred, the Court should not exercise its discretion to afford relief because the presence of Chief Judge Munson did not affect the fairness, integrity, or public reputation of the proceedings on appeal. *Cotton*, 122 S. Ct. at 1786. As an initial matter, Chief Judge Munson's character and abilities as a jurist, peculiarly experienced in adjudicating matters arising within the United States Territories, stand unimpeached. No allegation of actual unfairness, partiality, or lack of judicial acumen has been leveled. It is therefore difficult to understand how fairness or the public reputation of the judicial process is advanced by allowing criminal defendants, whose convictions are supported by "overwhelming" evidence, *ibid.*, to consume the public resources necessary for a second appellate review, where their claims already have been rejected unanimously by a quorum of the court—especially where at least one of those defendants appears to have deliberately refrained from objecting before the court of appeals. "It is exceedingly to be regretted, that exceptions which might be taken in abatement and often cured in a moment, should be reserved to the last stage of a suit, to destroy its fruits." *Turner* v. *Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799).

Second, this Court has long held that the "*de facto* officer doctrine confers validity upon acts performed by

a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder* v. *United States*, 515 U.S. 177, 180 (1995). Where, as with the Ninth Circuit panel here, "an office exists under the law," "it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions * * * under color of an election or appointment." *Norton* v. *Shelby County*, 118 U.S. 425, 444-445 (1886); see also *Waite* v. *City of Santa Cruz*, 184 U.S. 302, 322-323 (1902); *McDowell* v. *United States*, 159 U.S. 596, 601-602 (1895); *Wright & Wade* v. *United States*, 158 U.S. 232, 238 (1895); *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891) (citing additional cases).

The purpose of the doctrine parallels the fairness and public integrity concerns underlying this Court's plain error jurisprudence: the *de facto* officer doctrine promotes the public reputation of governmental proceedings by protecting "the public and individuals whose interests may be affected" by reliance on the validity of the court's judgments. *Norton*, 118 U.S. at 441. "The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact." *Id.* at 445.

In *Ryder*, this Court declined to apply the *de facto* officer doctrine to a claim that two of the three judges serving on the Coast Guard Court of Military Review were appointed in violation of the Appointments Clause of Article II of the Constitution, reasoning that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question." 515 U.S. at 182. But the Court

specifically distinguished from its ruling those prior cases applying the *de facto* officer doctrine where, as here, the objection had not been timely raised before the tribunal at issue and where the objection rested on statutory grounds. *Id.* at 181-182.[7] Petitioners' statutory claims thus remain subject to application of the *de facto* officer doctrine and, as such, the public interest is promoted by rejecting, rather than sustaining, their challenge.[8]

II. PETITIONERS' UNTIMELY CONSTITUTIONAL OBJECTIONS TO THE COMPOSITION OF THE APPELLATE PANEL DO NOT AFFECT THE VALIDITY OF THE JUDGMENT AFFIRMING THEIR CONVICTIONS

A. Outside The United States Territories, Article III Does Not Permit The Appointment Of Non-Article III Judges To Sit On Article III Courts

Petitioners argue at length (Br. 15-27) that the designation of a non-Article III judge to sit on the court of appeals violated Article III by vesting Article III power in an individual not constitutionally qualified to exercise that power. With respect to appeals coming

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[7] Petitioners' argument (Br. 40) that the doctrine is confined to minor defects in title is contradicted by history. See *Ex parte Ward*, 173 U.S. at 453-455 (*de facto* officer doctrine applied where defendant challenged appointment of judge under Article III); *Norton*, 118 U.S. at 446 (*de facto* officer doctrine applies where the appointment is "void because the officer was not eligible, or because there was a want of power in the electing or appointing body").

[8] The *de facto* officer doctrine has special relevance to matters arising within the United States Territories, given the greater likelihood in those jurisdictions for transitional and evolving forms of government, which can result in broad and complicated shifts in governmental personnel.

from lower Article III courts and arising within the United States proper, the government agrees with petitioners that the performance by a non-Article III judge of Article III functions on an "inferior Court[]" exercising general federal jurisdiction would violate Article III of the Constitution. That is because, by exercising general federal jurisdiction within the States of the United States, such courts could not be created pursuant to Congress's power over the Territories, U.S. Const. Art. IV, § 3, or its specialized powers under Article I, Section 8 to provide, for example, for the "Government" of the military. Such courts would have to be created pursuant to the Article I, Section 8, Clause 9 power to "constitute Tribunals inferior to the supreme Court," and Article III specifies that judges on such courts must enjoy Article III's protections of life tenure and guaranteed salary.

In addition, a decision by Congress to populate Article III courts with non-Article III judges would likely violate the separation of powers by enhancing Congress's influence and control over the decision-making of Article III courts, thereby diminishing the authority and independence of such tribunals. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 382, 397-408 (1989). Furthermore, subjecting the decisions of Article III district courts to the review of non-Article III judges— judges who are agents of the Legislative or Executive Branches—would raise distinctive separation of powers concerns. See, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). None of those separation of powers concerns affects the validity of the Ninth Circuit's judgment affirming petitioners' convictions, however, because territorial residents like petitioners do not enjoy the protections of Article III.

B. The Protections Of Article III Are Inapplicable To Cases Arising Within The Territories

1. *Article III Did Not Apply to Petitioners' Appeal*

Petitioners' constitutional objection to the Ninth Circuit's judgment fails because the adjudication of cases arising within the United States Territories is not subject to Article III. This Court has made clear that,

> in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

Glidden Co. v. *Zdanok*, 370 U.S. 530, 544 (1962) (plurality opinion) (footnote omitted); see also *McAllister* v. *United States*, 141 U.S. 174, 187 (1891) ("no such guaranties are provided by [Article III] in respect to judges of courts created by or under the authority of Congress for a Territory of the United States"). Indeed, rulings confirming the inapplicability of Article III to the adjudication of territorial cases date back to the earliest days of this Court, and have been consistently applied for 160 years. See, *e.g.*, *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 64-65 (1982) (noting territorial exception to Article III); *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932); *Downes* v. *Bidwell*, 182 U.S. 244, 270 (1901); *McAllister*, 141 U.S. at 179-184 (citing additional cases); *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850); *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.). "Only

'fundamental' constitutional rights are guaranteed to inhabitants of * * * [the unincorporated] territories," and petitioners claim no violation of such rights before this Court. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268-269 (1990); *Downes*, 182 U.S. at 282-283 (discussing applicable rights).[9]

The reason for Article III's inapplicability is that, when establishing a court system for the Territories, Congress acts in a capacity similar to that of a state government creating a state court system. *Palmore* v. *United States*, 411 U.S. 389, 403 (1973); *Benner*, 50 U.S. (9 How.) at 242. Congress may "legislate for the [territories] in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8." *Palmore*, 411 U.S. at 398. Accordingly, the Constitution does not require that either the trial court or the appellate court comply with the strictures of Article III. See, *e.g.*, *id.* at 402-403 & n.11 (citing additional cases). That is true even if the tribunal decides questions of federal law. There is no requirement that only an Article III court can hear and determine questions of federal law. "Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges

[9] See also *Balzac* v. *Porto Rico*, 258 U.S. 298, 304-305 (1922) (Sixth Amendment right to a jury trial does not apply); *Ocampo* v. *United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury provision is inapplicable); *Dorr* v. *United States*, 195 U.S. 138, 149 (1904) (right to a jury trial is inapplicable); *Hawaii* v. *Mankichi*, 190 U.S. 197, 218 (1903) (provisions on indictment by grand jury and jury trial are inapplicable); *Downes*, 182 U.S. at 287 (Revenue Clauses of the Constitution do not apply).

in Art. III." *Id.* at 402; see also *Testa* v. *Katt*, 330 U.S. 386, 392 (1947). As with the state court system, this Court remains available to review questions of federal law decided by courts within the territorial system. That is the most protection territorial residents can claim under Article III, and that protection was not transgressed here. Cf. *Olsen*, 431 U.S. at 203-204 (denying Guam litigants access to "any Art. III tribunal" on appeal "of local-court decisions might present constitutional questions").

Accordingly, petitioners' Article III challenge to the court of appeals' judgment fails. Petitioners do not dispute that their cases arose within a United States Territory where Article III does not apply. Petitioners are both residents of the United States Territory of Guam—neither is a resident of any State within the United States; petitioner Nguyen is not even a United States citizen. The criminal conduct of which they were convicted occurred within Guam, and they were tried before a non-Article III territorial court. In hearing petitioners' appeal, moreover, the Ninth Circuit conducted a special sitting in the Territory of Guam and at that sitting adjudicated only cases arising from within Guam. See J.A. 7. As a result, petitioners are no better positioned than a litigant in state court (where, for example, state appellate judges might be elected) to complain that their appeals court lacked the protections of Article III. "Neither has a federal constitutional right to be tried before judges with tenure and salary guarantees." *Palmore*, 411 U.S. at 391.

Looked at another way, whether or not the designation of Chief Judge Munson violated Article III in some general sense, petitioners lack standing to object to that violation because they do not fall within the zone of interests protected by Article III. "As early as 1907,

this Court took the position that remedies for violations of constitutional rights would only be afforded to a person who 'belongs to the class for whose sake the constitutional protection is given.'" *United States* v. *Salvucci*, 448 U.S. 83, 86 (1980) (quoting *New York ex rel. Hatch* v. *Reardon*, 204 U.S. 152, 160 (1907)). Residents of the territories, however, do not enjoy the protections of Article III with respect to cases or controversies adjudicated within the territories. They have no "independent right to adjudication in a constitutionally proper forum" under Article III, and thus have not suffered an "Article III injury." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579-580 (1985). Like the Fourth Amendment, an individual's "capacity to claim the protection" of Article III "may depend upon where those people are." *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978)); see also *Verdugo-Urquidez*, *supra*; *Balzac* v. *Porto Rico*, 258 U.S. 298, 309 (1922) ("It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure.").

It is not enough that petitioners have identified an aspect of their proceedings that would be unconstitutional if applied to someone who is entitled to the protections of Article III in a federal prosecution. "[A] litigant may only assert his own constitutional rights or immunities." *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961) (citation omitted). Accordingly, however unconstitutional Chief Judge Munson's service would have been for the vast majority of litigants whose cases are heard by the Ninth Circuit, the designation was not unconstitutional under Article III as applied to territorial residents like petitioners. Petitioners received all the constitutional process they were due on appeal. Indeed, petitioners concede that Congress could, consistent with Article III, "create[] an amalgamated court, like the panel that heard cases here." Pet. Br. 26. But if Article I permits exactly the review petitioners received, then Article III cannot forbid it. Because Chief Judge Munson's designation did not run afoul of any Article III right of petitioners, the court of appeals' unanimous judgment remains valid.

2. *Article III's Structural Protections Were Not Violated*

Petitioners attempt to circumvent that barrier to relief by arguing (Br. 26-27) that, once Congress designated the Ninth Circuit to hear appeals from the Guam District Court, the consideration of those appeals had to comport with Article III. But the passage of that *statutory* provision, 28 U.S.C. 1294(4), did not expand petitioners' *constitutional* rights. It did not vest petitioners with an individual, constitutionally protected property or liberty interest in having an Article III-compliant appellate panel. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Nor did the designation of Chief Judge Munson violate any of those fundamental rights, such as equal protection, that petitioners enjoy as residents of the territories. The statute thus created, at best, a statutory expectancy that the panel would comport with Article III—and that is a protection that petitioners forfeited below.

Petitioners further err in contending (Br. 23-25) that the structure of Article III itself inherently forbade the court of appeals panel from hearing these two cases. In *CFTC* v. *Schor*, 478 U.S. 833 (1986), the Court explained that the structural principles enforced by Article III are the separation of powers and "preventing the 'encroachment or aggrandizement of one branch at the expense of the other.'" *Id.* at 850 (quot-

ing *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976)). But those aspects of Article III have nothing to do with petitioners' claim. Separation of powers principles do not apply within the territories, so petitioners cannot invoke their protections. *Benner*, 50 U.S. (9 How.) at 242 (territorial governments are not subject to the Constitution's "complex distribution of the powers of government"). In any event, this one-time mistaken designation by an officer internal to the Judicial Branch does not remotely raise the specter of inter-Branch encroachment or aggrandizement.

Petitioners' structural argument, moreover, fails to come to grips with the fundamental fact that consideration of appeals from the territories is not a function that the Constitution restricts to Article III courts. See *Northern Pipeline*, 458 U.S. at 63 n.14 ("legislative courts may be granted jurisdiction over some cases and controversies to which the Art. III judicial power might also be extended"). In designating the Ninth Circuit to hear appeals from the District Court of Guam (and, until the establishment of the Guam Supreme Court, from the territorial appellate court of Guam, see 48 U.S.C. 1424-3), Congress acted as much pursuant to its Article IV powers as it did to its Article I power to create inferior federal courts. As petitioners acknowledge (Br. 26), nothing in Article III requires such appeals to be adjudicated by judges appointed pursuant to its provisions. See also *Northern Pipeline*, 458 U.S. at 64-65. Chief Judge Munson, in other words, was fully qualified, as a constitutional matter, to adjudicate petitioners' appeal because he was constitutionally empowered to adjudicate territorial cases both at the trial and appellate level. Petitioners' insistence (Br. 23-24) that Chief Judge Munson had to act under the supervision of an Article III judge or necessarily was

vested with Article III power thus falls wide of the mark.[10]

Nor does anything in Article III preclude its judges from adjudicating territorial cases in conjunction with an Article IV judge. Territorial appeals are not the type of legal questions that inherently must be adjudicated exclusively by Article III panels. *Northern Pipeline*, *supra*; *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). As this Court has observed, moreover, unlike Members of Congress, U.S. Const. Art. I, § 6, Cl. 2 (Incompatibility Clause), nothing in the Constitution forbids Article III judges from performing tasks beyond Article III's enumerated areas of adjudication and serving with non-Article III officials. *Mistretta*, 488 U.S. at 397-400. The question is whether such tasks are consonant with the judicial function and whether they would interfere with the ability of judges to continue to perform their constitutionally assigned adjudicatory roles. *Id.* at 388 ("Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."); *id.* at 393 (Congress may assign to the Judicial Branch tasks that "pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds").[11]

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[10] In any event, the panel's decision remained subject to supervisory en banc review by the entire Ninth Circuit, yet another option that petitioners deliberately eschewed.

[11] Congress, in fact, has authorized Article III judges to serve temporarily as judges on the District Courts of the Territories of Guam, the Virgin Islands, and the Northern Marian Islands, upon appointment by the Chief Judge of the governing Circuit or the Chief Justice. See 48 U.S.C. 1424b(a), 1614(a), 1821(b)(2). That

Those bounds were not transgressed here. Adjudicating appeals from the territories concerning questions of federal law arising in a federal prosecution is consonant with the Article III function. See U.S. Const. Art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States"); cf. *Morrison* v. *Olson*, 487 U.S. 654, 677 (1988) ("executive or administrative duties of a *nonjudicial* nature may not be imposed on judges holding office under Art. III of the Constitution") (quoting Buckley, 424 U.S. at 123) (emphasis added). Accordingly, "[t]his is not a case in which judges are given power * * * in an area in which they have no special knowledge or expertise." *Morrison*, 487 U.S. at 676 n.13.

Furthermore, the "practical consequences," *Mistretta*, 488 U.S. at 393, of this one-time mistaken designation of territorial judges to sit on a Ninth Circuit panel, under circumstances where no exercise of the Article III power was constitutionally required, did not diminish the Ninth Circuit's ability to perform its core appellate functions or threaten inter-Branch aggrandizement. It is that "practical attention to substance rather than doctrinaire reliance on [petitioners'] formal categories" and broad principles that have no appli-

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service would presumably also include fulfilling the district court's appellate functions by sitting with Article IV District Court judges or territorial judges. See, *e.g.*, *In re Richards*, 213 F.3d 773, 779 (3d Cir. 2000) (explaining composition of the District Court for the Virgin Islands when serving in an appellate capacity). The appellate division of the District Court of Guam historically consisted of a panel of three judges including the District Judges of Guam and the Northern Mariana Islands, and a Circuit or District Judge from the Ninth Circuit. P. Nicolas, *American-Style Justice in No Man's Land*, 36 Ga. L. Rev. 895, 1035 n.931 (Summer 2002).

cation to territorial residents that "should inform application of Article III" in this peculiar case. *Thomas*, 473 U.S. at 587; see also *id.* at 590 (application of Article III should focus on "the nature of the right at issue" in the particular case); *Schor*, 478 U.S. at 857 ("due regard must be given in each case to the unique aspects of the [action] at issue and its practical consequences in light of the larger concerns that underlie Article III"). A realistic appraisal of the inter-Branch consequences of this isolated designation "can only be termed *de minimis*," if not non-existent. *Id.* at 856.

Finally, even if the Court perceives a potential Article III obstacle to the operation of the joint panel, this case provides no occasion to address the limits of congressional power over territorial appeals. That is because Congress did not create this panel; an Article III judge did. Any perceived injury to the integrity or independence of the Judicial Branch thus did not result from either legislative aggrandizement or deliberate judicial abandonment of responsibilities. Cf. *Peretz*, 501 U.S. at 937 (no structural violation of Article III occurs where "the entire process takes place under the district court's total control and jurisdiction, [so] there is no danger that use of the magistrate involves a congressional attempt to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts") (internal quotation marks and citations omitted). Full authority to review and correct any resulting injury remained in the en banc Ninth Circuit and in this Court. This case was, at worst, an internal judicial oversight, not an unconstitutional erosion of the entire Judicial Branch's Article III powers.

Any perceived Article III injury was also fleeting. As petitioners note (Br. 17), "the designation of a non-

Article III territorial judge to sit on a Federal Court of Appeals is all but unheard-of." No other court of appeals has shared its authority with non-Article III judges. Before these cases, the Ninth Circuit had not done so for more than half of a century, see note 4, *supra*, and has no apparent intention of doing so again.[12] An opinion from this Court noting the potential constitutional difficulties with such designations should more than suffice to prevent its recurrence. Internal judicial errors, however, should not become the mechanism for imposing restraints on unexercised congressional power.

In short, in light of this Court's well-established principles of constitutional avoidance, an unintentional misstep by a single federal judicial official should not be the occasion for this Court to etch into constitutional stone unnecessary limitations on Congress's "exceptional powers" over territory under its direct authority. *Northern Pipeline*, 458 U.S. at 70. "Particularly in an area of constitutional law such as that of 'Art. III Courts,' * * * rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy." *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment).

C. The Appointments Clause Does Not Affect The Validity Of The Ninth Circuit's Judgment

Petitioners further contend (Br. 27-33) that the designation of a non-Article III judge to sit on the Ninth Circuit panel violated the Appointments Clause

[12] A Ninth Circuit panel sat in the Northern Mariana Islands again this February, but the panel was composed of three Article III judges.

of the Constitution. That Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, Cl. 2. The designation of Chief Judge Munson did not violate the Appointments Clause for three reasons.

First, this Court has never held that the Appointments Clause applies to the governance of the United States Territories. The Court has never identified it as one of the fundamental rights enjoyed by residents of the Territories. See *Verdugo-Urquidez*, 494 U.S. at 268-269; *Downes*, 182 U.S. at 282-283. To the contrary, the Appointments Clause, like the protections of Article III, regulates only the framework of the federal government and thus is no more applicable to the Territories than it is to State governments. Accordingly, petitioners are not within the class of persons protected by the Appointments Clause, and transgression of that Clause, if any, cannot invalidate the judgments affirming their convictions in a territorial court.

Second, the limited designation of a territorial judge to sit within a territory and hear appeals in cases from territorial courts does not violate the Appointments Clause. Chief Judge Munson had already been appointed by the President and confirmed by the Senate to adjudicate cases as a district judge for the Northern

Mariana Islands. 48 U.S.C. 1821(b)(1). A circuit judge's designation of district court judges to sit temporarily on a court of appeals panel, 28 U.S.C. 292(a), does not violate the Appointments Clause in its own right. Permitting a territorial judge temporarily to hear cases arising from another territory likewise does not run afoul of the Appointments Clause, any more so than designating a district court judge to sit temporarily in another district. See *Lamar* v. *United States*, 241 U.S. 103, 118 (1916) (explaining the "absolute unsoundness" of the argument that "to assign a judge of one district and one circuit to perform duty in another district of another circuit was in substance to usurp the power of appointment and confirmation vested by the Constitution in the President and Senate").

While designating a territorial judge to hear appeals in cases arising outside the United States Territories might violate the Appointments Clause, because it would significantly expand that judge's functions and judicial capacity, the appellate adjudication of territorial cases was sufficiently germane to Chief Judge Munson's confirmed judicial authority that no new appointment was needed. See *Weiss* v. *United States*, 510 U.S. 163, 174 (1994); *Shoemaker* v. *United States*, 147 U.S. 282, 300-301 (1893) (where territorial officials were already appointed by the President and confirmed by the Senate, a new appointment need not be made where "additional duties, germane to the offices already held by them, were devolved upon them").

This Court adopted just such a context-specific approach to the Appointments Clause in *Weiss*, when it held that service as a military judge is germane to the duties of a commissioned military officer, "[w]hatever might be the case in civilian society." 510 U.S. at 176. Likewise, "[w]hatever might be the case" outside the

territories, it is not necessary for inferior appellate courts to exercise Article III power to adjudicate territorial appeals. Therefore, no expansion of Chief Judge Munson's judicial authority was necessary and no Appointments Clause violation resulted.

Third, the government is aware of no case in which this Court has treated a mistaken construction of a statutory provision, which resulted in an isolated, brief, and, in context, non-substantive alteration in an officer's functions, as an inter-Branch confrontation under the Appointments Clause. There is virtually no historic practice of designating non-Article III judges to sit on court of appeals panels, and no court of appeals has an established policy or practice of doing so. This Court's review of the statutory question posed by petitioners will sufficiently alert the courts of appeals currently not to designate territorial judges to sit on court of appeals panels in the future. Further constitutional adjudication of sensitive separation of powers questions is unnecessary and, therefore, should be avoided. See *Muskrat* v. *United States*, 219 U.S. 346, 359 (1911) (resolution of questions of constitutional power "is legitimate only in the last resort"); *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 448-449 (1830) (Story, J.) (Court should address questions of constitutional power only when "unavoidable").

D. Petitioners Waived Their Constitutional Challenges

By failing to object to the composition of the panel before the court of appeals, petitioners waived their right, if any, to a panel composed entirely of Article III judges. This Court's precedents are clear that, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights

that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-849. See also *id.* at 848 (the Article III "guarantee of an independent and impartial adjudication by the federal judiciary * * * protect[s] primarily personal, rather than structural, interests"); *Peretz*, 501 U.S. at 936-937 ("[T]he Constitution affords no protection to a defendant * * * who fails to demand the presence of an Article III judge at the selection of his jury.").

The requirement that parties raise below their constitutional objections promotes two main purposes, both of which have salience in this case: the promotion of judicial economy by alerting the lower court to a problem at a time when the court may be able to resolve the matter, and preventing parties from pursuing a certain course for tactical reasons and only later, if the outcome is unfavorable, claiming that the court's actions amount to reversible error. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 89-90 (1977). The contemporaneous objection rule thus ensures that the proceedings below are the "main event," rather than a "tryout on the road" to this Court. *Id.* at 90; see also *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) ("[T]his is a court of final review and not first view.") (quoting *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 369 (1996)).

In *Glidden*, *supra*, the plurality opinion reiterated that the rule of waiver "is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." 370 U.S. at 535. The Court nevertheless exercised its discretion to address the waived argument concerning the composition of the tribunal in that case, *id.* at 535-536, and in *Freytag*, *supra*. Both of those

cases, however, involved challenges to congressionally created courts that were continuing to operate, thereby creating a significant and ongoing public interest in the prompt resolution of the courts' authority to act. They were, in the Court's words, "rare cases" that warranted a departure from the foundational principle that constitutional rights are forfeited by "the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Olano*, 507 U.S. at 731 (citation omitted).

Here, by contrast, the designation of a territorial judge to sit on a panel of the Ninth Circuit was a one-time, isolated mistake, of which there is no reasonable likelihood of recurrence. There is also reason to believe that petitioner Nguyen's failure to challenge the panel below was deliberate and strategic, rather than inadvertent. In those circumstances, principles of judicial restraint, constitutional avoidance, and the public interest would be ill-served by granting discretionary review.

Petitioners argue (Br. 33-36) that the designation of Chief Judge Munson was structural and jurisdictional error that may not be waived. "But the proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with [this Court's] cases." *Plaut*, 514 U.S. at 231; see also *Freytag*, 501 U.S. at 893 (Scalia, J., concurring in part and concurring in the judgment) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review."). If the exercise of Article III powers by a non-Article III judge were an unwaivable structural or jurisdictional defect, there would have been no basis for this Court to exercise its discretion to hear the

claims in *Freytag* and *Glidden*—consideration of those claims would have been mandatory.

Petitioners' argument, moreover, confuses the jurisdictional authority of the court to act with the lawfulness of the manner in which it acted, which is not jurisdictional. See *Ex parte Ward*, 173 U.S. at 454 (distinguishing between "jurisdiction" of the court, and a particular individual's "right to exercise the judicial functions," where his appointment is challenged under Article III); *Peretz*, 501 U.S. at 953 (Scalia, J., dissenting). "It is the *case*, then, and not *the court*, that gives the jurisdiction" under the Constitution. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338 (1816) (Story, J.). The panel of the Ninth Circuit Court of Appeals had subject matter jurisdiction to hear this case because it was an appeal from a federal criminal prosecution in federal court. At the same time, the territorial character of the case made it constitutionally permissible for the appeal to be heard by a non-Article III judge.

Petitioners' complaint thus is not with the power of the court to act; it is with the manner in which that court operated. That claim may be waived. Otherwise the Article III limitations on the role of magistrate judges, operating in conjunction with Article III district court judges, in criminal prosecutions, see *Gomez* v. *United States*, 490 U.S. 858 (1989), could not be overcome by a defendant's consent. Yet this Court held otherwise in *Peretz*, *supra*. Consent could not have been dispositive if the magistrate judge's role raised jurisdictional questions.

Likewise, if the exercise of Article III power by a non-Article III judge deprived the court of jurisdiction, this Court would have had to vacate immediately the judgments of the offending tribunals, rather than stay

its own judgments and make them prospective, as the Court did in *Northern Pipeline*, 458 U.S. at 88-89, and in *Buckley*, 424 U.S. at 142-143.

The protections of the Appointments Clause are equally subject to waiver. *Plaut*, 514 U.S. at 232 (citing *Freytag*, 501 U.S. at 878-879). Indeed, in this case, not only did petitioners fail to raise their Appointments Clause argument at any time before the panel or seek rehearing before the en banc Ninth Circuit, they also failed to raise the Appointments Clause argument at the petition stage before this Court. Petitioners' opening brief on the merits is the first time in the history of this litigation that the Appointments Clause has been mentioned. See *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997) ("We decline to address these questions which were neither raised nor decided below, and were not presented in the petition for certiorari.").

E. The Presence Of A Non-Article III Judge On The Court Of Appeals Panel Was Not Plain Constitutional Error

Even if petitioners' constitutional objections to the composition of the appellate panel were not waived, the judgment must be affirmed because the designation of Chief Judge Munson was not plain error. The constitutional error—if any, given petitioners' territorial residency—was not plain. No constitutional precedent under Article III squarely addresses whether judgments arising from the territories can be reviewed by a panel composed of Article III and Article IV judges, although historic practice suggests that such mixed panels are permissible. See n.11, *supra*. Petitioners concede (Br. 26) that such review may be constitutionally permissible if prescribed by Congress. Given that concession and the inability of territorial residents to claim the protections of Article III, there is at least a

substantial question whether constitutional error occurred in this case at all. See *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment) (noting the "frequently arcane distinctions and confusing precedents" in Article III jurisprudence).

In any event, any error did not affect petitioners' substantial rights. For many of the same reasons that petitioners' statutory claim does not amount to plain error, see pages 13-15, *supra*, petitioners have failed to show that the alleged constitutional error resulted in any actual prejudice or affected the fairness, integrity, or public reputation of judicial proceedings, given the overwhelming evidence of their guilt and the insubstantiality of their claims on appeal. As the Court has previously observed, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson*, 520 U.S. at 470 (internal quotation marks and citation omitted).

In short, in the absence of any contention by petitioners either (i) that the outcome of their appeal *actually*, as opposed to hypothetically, could have been affected in any way by Chief Judge Munson's participation, or (ii) that any discernible structural injury to the Judicial Branch occurred, providing relief will do nothing but provide a windfall to defendants who, out of laxity or strategic gamesmanship, waste governmental resources by failing to object in a timely manner to the composition of the court before which they appear. "We do not think that Article III compels this degree of prophylaxis." *Schor*, 478 U.S. at 856.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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